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NO.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOSEPH CARL WHITE — PETITIONER

versus

COMMONWEALTH OF KENTUCKY — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the double jeopardy clause bars a Defendant's retrial as a Persistent Felony Offender II when he has been acquitted on appeal of Persistent Felony Offender I for insufficient evidence.

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The Supreme Court of Kentucky, the Kentucky court of last resort, has decided a federal question in direct conflict with the decision of another state court of last resort and with a decision of a United States Court of Appeals. The Kentucky Supreme Court has decided a federal question in direct conflict with applicable decisions of the United States Supreme Court.

Further, the issue herein is extremely similar, if not identical, to the issue in Bohlen v. Caspari, 979 F.2d 109 (8th Cir. 1992), in which this court granted Certiorari June 14, 1993 (92-1500). This Writ should be granted and joined with Bohlen or an opinion entered in keeping with the Court's decision in that case. 4

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JOSEPH CARL WHITE — PETITIONER

v.

COMMONWEALTH OF KENTUCKY — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, Joseph Carl White, respectfully prays that a Writ of Certiorari be issued to review the opinion of the Kentucky Court of Appeals entered on September 25, 1992 and the Supreme Court of Kentucky's Order denying discretionary review on June 23, 1993.

OPINIONS BELOW

The original opinion of the Kentucky Court of Appeals was rendered on April 8, 1988. The Supreme Court of Kentucky granted limited discretionary review and rendered a limited opinion on March 16, 1989. The Kentucky Court of Appeals rendered a second unpublished opinion September 25, 1992. The Supreme Court of Kentucky denied discretionary review June 23, 1993.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257. The Kentucky Court of Appeals opinion was rendered September 25, 1992. The Supreme Court of Kentucky denied discretionary review on June 23, 1993.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor shall any person be subject for the same ofense to be twice put in jeopardy of life or limb; . . .

STATEMENT OF THE CASE

The Petitioner was indicted in the Kentucky State Court on October 16, 1985, for Burglary III, Criminal Mischief III, Possession of Burglary Tools and Persistent Felony Offender I (PFO) in violation of KRS 532.080. (Vol. I, pp. 1-3). The Petitioner was convicted of PFO I on November 7, 1986, and received a 10 year sentence. The Petitioner appealed to the Kentucky Court of Appeals. In an opinion rendered April 8, 1988, the Kentucky Court of Appeals reversed the PFO I conviction on the insufficiency of the evidence. The Kentucky Court of Appeals held the Commonwealth only proved the lesser included offense of PFO II. The Supreme Court of Kentucky granted limited discretionary review on August 30, 1988. (TR Vol. II, p. 229, App. p. 12a). The Supreme Court of Kentucky reviewed only whether the double jeopardy clause prevented retrial, Petitioner could be resentenced without retrial or was entitled to a new trial by jury. The Kentucky Supreme Court rendered its opinion March 16, 1989, and held the Petitioner could not be sentenced without retrial, was entitled to a trial by jury but the double jeopardy clause of the United States Constitution did not prohibit retrial in that PFO was a status offense. (TR Vol. II, pp. 241-247, App. p. 8a).

The Petitioner was retried by jury on May 31, 1991, as a PFO II. At said trial the Commonwealth was required to prove the

Petitioner was guilty of being a PFO II beyond a reasonable doubt. The Petitioner was found guilty of being a PFO II and received a five year sentence (TR Vol. II, pp. 297-299). The Petitioner again appealed to the Kentucky Court of Appeals and again argued his retrial was barred by the double jeopardy clause of the United States Constitution.

The Petitioner called the Appellate Court's attention to recent decisions dealing with this double jeopardy issue which had decided this issue in direct conflict with the prior opinion of the Supreme Court of Kentucky. The Kentucky Court of Appeals responded the Supreme Court of Kentucky would be the "form best suited for reconsideration of this issue". (Opinion, Kentucky Court of Appeals, 9/25/92, App. p. 7a). The Kentucky Court of Appeals then declined to address the issue. The Petitioner requested the Kentucky Court of Appeals for a Rehearing which was denied December 18, 1992. (App. p. 2a) The Petitioner then filed a Motion for Discretionary Review with the Supreme Court of Kentucky. The Supreme Court of Kentucky denied discretionary review without comment by Order entered June 23, 1993. (App. p. 1a).

REASON FOR GRANTING WRIT

The Supreme Court of Kentucky, the Kentucky court of last resort, has decided a federal question in direct conflict with the decision of another state court of last resort and with a decision

of a United States Court of Appeals. The Kentucky Supreme Court has decided a federal question in direct conflict with applicable decisions of the United States Supreme Court.

Further, the issue herein is extremely similar, if not identical, to the issue in Bohlen v. Caspari, 979 F.2d 109 (8th Cir. 1992), in which this court granted Certiorari June 14, 1993 (92-1500). This Writ should be granted and joined with Bohlen or an opinion entered in keeping with the Court's decision in that case.

Double jeopardy protection is provided by the Fifth Amendment of the United States Constitution. This double jeopardy protection is fully applicable to the States through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 789, 89 Sup.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969). PFO I and PFO II are the "same offense for purposes of the double jeopardy protection. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)3. PFO I, the greater offense includes the lesser offense of PFO II. The lesser offense, PFO II, requires no proof beyond the greater offense, PFO I. Brown v. Ohio, 432 U.S. 161, 168, 97 S.Ct. 221, 226, 53 L.Ed.2d 187 (1987). Therefore, the greater offense by definition is the same as any lesser included offense. Reversal of a conviction for a greater offense precludes retrial for a lesser offense. Green v. Masey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed. 15 (1978).

The Supreme Court of Kentucky in its opinion in White v. Commonwealth of Kentucky, Ky., 770 S.W.2d 222 (1989) (App. p. 3a) at page 224 stated as follows:

> [2] Conviction as a Persistent Felony Offender is not a charge of an independent criminal offense but rather a particular criminal status. Consequently double jeopardy does not attach. Persistent Felony Offender proceedings involve the status of the offender and the length of the punishment, not a separate or independent criminal offense. ... Retrial of White as a second degree Persistent Felony Offender would not be prohibited by the constitutional provisions against double jeopardy.

The Kentucky Supreme Court went on to recognize that Defendants are entitled to a trial by jury on their status as persistent felony offenders. The Kentucky position seems in direct conflict with Stephens v. State, 806 S.W.2d 812 (Tex.Cr.App. 1990), cert. denied, 59 U.S.L.W. 3772 (U.S. April 29, 1991, No. 90-1668). In Stephens, the highest appellate court in Texas held the double jeopardy clause precluded a second trial when the appellate court reversed the Defendant's conviction for aggravated rape due to the insufficiency of the evidence. Double jeopardy barred the subsequent prosecution for the lesser included offense of rape. This well reasoned decision cited an aggregation of U. S. Supreme Court cases, all of which are in direct conflict with the decision of the Kentucky Supreme Court in this case.

Bohlen v. Caspari, 979 F.2d 109 (8th Cir. 1992), cert. granted June 14, 1993, held the double jeopardy clause does

apply to persistent felony offender trials. The opinion of the United States Appeals for the Eighth Circuit in Bohlen is in direct conflict with the decision of the Kentucky Supreme Court in this case.

This Court has already decided the double jeopardy clause precludes a second trial once an appellate court has determined that the evidence was insufficient to sustain a conviction. Burlington v. Missouri, 451 U.S. 430, 442, 101 S.Ct. 1852, 1860, 68 L.Ed.2d 270 (1981); Burks v. United States, 437 U.S. 1, 16, 98 S.Ct. 2141, 2149-50, 67 L.Ed.2d 1 (1978).

This Court specifically held a verdict of acquittal is final, ending a defendant's jeopardy. A reversal by an appellate court based on the insufficiency of the evidence has the same effect as an acquittal in the trial court. Tibbs v. Florida, 457, U.S. 31, 41-42, 102, 2211, 2218, 72 L.Ed.2d 652 (1982). The Supreme Court of Kentucky decision in this case ignores the applicable decisions of this court and of the United States Court of Appeals for the Eighth Circuit by simply stating that PFO is a status offense and thus the rules of double jeopardy do not apply.

This is an important question of federal law which occurs frequently as most states now having enhancement provisions and this issue should be settled by this Court.

CONCLUSION

This Writ provides the Court with an opportunity to clarify

whether the double jeopardy clause applies to persistent felony offender sentencing. This is a frequently occurring issue and there appears to be direct conflict between the Supreme Court of Kentucky, the United States Court of Appeals for the Eighth Circuit and applicable decisions of this Court. A Writ of Certiorari should be granted to review the opinion of the Supreme Court of Kentucky with consideration given to joinder with Bohlen v. Caspari, 979 F.2d 109 (8th Cir. 1992) (cert. granted June 14, 1993, No. 92-1500).

Respectfully submitted,

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